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7 BILLY DRIVER,  
8 Plaintiff,  
9 v.  
10 AVILA, ET.AL,  
11 Defendant.

Case No. 23-cv-03119-JD

**ORDER TO SHOW CAUSE**

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13 Plaintiff, a state prisoner, filed a pro se civil rights complaint under 42 U.S.C. § 1983.  
14 Plaintiff also filed a motion to proceed in forma pauperis (“IFP”), but it appears that he is three  
15 strikes barred and cannot proceed IFP pursuant to 28 U.S.C. § 1915(g), unless he is under  
16 imminent danger of serious physical injury.

17 The Prison Litigation Reform Act of 1995 (“PLRA”), provides that a prisoner may not  
18 bring a civil action or appeal a civil judgment under 28 U.S.C. § 1915 “if the prisoner has, on three  
19 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal  
20 in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or  
21 fails to state a claim upon which relief may be granted, unless the prisoner is under imminent  
22 danger of serious physical injury.” 28 U.S.C. § 1915(g).

23 The plain language of the imminent danger clause in § 1915(g) indicates that “imminent  
24 danger” is to be assessed at the time of filing of the complaint. *See Andrews v. Cervantes*, 493  
25 F.3d 1047, 1053 (9th Cir. 2007). The Ninth Circuit has also found that “the imminent danger  
26 exception to § 1915(g) requires a nexus between the alleged imminent danger and a prisoner’s  
27 complaint.” *Ray v. Lara*, 31 F.4th 692, 695 (9th Cir. 2022). The Ninth Circuit adopted the  
28 Second Circuit’s “nexus test” from *Pettus v. Morgenthau*, 554 F.3d 293, 299 (2d Cir. 2009). The

United States District Court  
Northern District of California

1 factors are (1) whether the imminent danger of serious physical injury that a three-strikes litigant  
2 alleges is fairly traceable to unlawful conduct asserted in the complaint and (2) whether a  
3 favorable judicial outcome would redress that injury. *Ray*, 31 F.4th at 701. “Thus, in order to  
4 qualify for the § 1915(g) imminent danger exception, a three-strikes prisoner must allege  
5 imminent danger of serious physical injury that is both fairly traceable to unlawful conduct alleged  
6 in his complaint and redressable by the court.” *Id.*

7 The following five cases are strikes pursuant to § 1915(g):

- 8 1. *Driver v. Martel*, Case No. 08-cv-1910 GEB EFB (E.D. Cal.) (dismissed for failure to  
9 state a claim). The Ninth Circuit affirmed the dismissal for failure to state a claim.  
*Driver v. Martel*, 395 Fed. Appx. 392 (9th Cir. 2010) (unpublished).
- 10 2. *Driver v. Kelso*, Case No. 11-cv-2397 EFB (E.D. Cal.) (dismissed for failure to state a  
11 claim). The Ninth Circuit affirmed the dismissal. *Driver v. Kelso*, 514 Fed. Appx. 662  
(9th Cir. 2013) (unpublished).
- 12 3. *Driver v. EPP*, Case No. 12-cv-589 EFB (E.D. Cal.) (dismissed for failure to state a  
13 claim).
- 14 4. *Driver v. Judge Susan Illston*, Case No. 13-2508 JST (N.D. Cal.) (dismissed for failure  
15 to state a claim).
- 16 5. *Driver v. Zamora*, Case No. 14-cv-2170 BRO AGR (C.D. Cal.) (dismissed for failure  
17 to state a claim). The Ninth Circuit affirmed the dismissal for failure to state a claim.  
*Driver v. Zamora*, 621 Fed. Appx. 421 (9th Cir. 2015) (unpublished).

18 Plaintiff must show cause why the IFP application should not be denied. He may address  
19 the strike cases above or demonstrate that he is under imminent danger of serious physical injury.

20 The Court orders as follows:

- 21 1. Plaintiff may show cause within twenty-eight (28) days, why this case should not be  
22 deemed three strikes barred and the application to proceed in forma pauperis denied. In the  
23 alternative, plaintiff may pay the full \$402.00 filing fee by the deadline.
- 24 2. It is the plaintiff’s responsibility to prosecute this case. Plaintiff must keep the Court  
25 informed of any change of address by filing a separate paper with the clerk headed “Notice of  
26 Change of Address,” and must comply with the Court’s orders in a timely fashion. Failure to do  
27 so may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule of  
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1 Civil Procedure 41(b).

2 **IT IS SO ORDERED.**

3 Dated: August 17, 2023

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6 JAMES DONATO  
7 United States District Judge  
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